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actually been published . . . as provided in this act," to quote the principal case, why was not this defect also waived?

The test laid down in the principal case is clear and definite, but it is not the test of *Chase v. Trout*. Its practical effect is that the property owner in every case of a defective proceeding must protect himself by entering his protest, regardless of the substantiality of the defect. It extends the rule of *Chase v. Trout* the whole way, and applies it to every stage of the proceedings. It represents the reaction from the former overstrict definition of "due process" and the exaggerated regard for the rights of property.

The effect of the rule of *Chase v. Trout*, on the other hand, is to allow a property owner, in the event of a substantial defect in the resolution of intention, to rely for his protection on the inherent invalidity of the proceedings. Which of the two is the proper test is not an academic question, but one that must be determined by practical considerations of convenience and policy.

B. F. R.

PARTNERSHIP: ENTITY THEORY IN PROCEDURE.—The Supreme Court of California has required that when an action is brought against a copartnership in its firm name, appearance likewise must be in the firm name. In the case of *Artana v. San Jose Scavenger Co.*,<sup>1</sup> action was brought against the copartnership as such. A demurrer was interposed to the complaint by one Peter Devincenzi, not named therein, who described himself as "sued as the San Jose Scavenger Co., a copartnership." This demurrer purported to be the demurrer of Devincenzi as an individual—not of the defendant partnership. The court held that the demurrer was not entitled to consideration, stating that the "association, whether it be a copartnership or other association of individuals transacting business under a common name, is, for the purposes of the section, a legal entity distinct from its members, and it is this legal entity which is in this action<sup>2</sup> the sole party defendant."

Is not the disposition of the court to regard the code provision as necessarily involving the existence of a legal entity for the purpose of making a defense subject to question? The method afforded plaintiffs in actions against partnerships or associations to obtain jurisdiction of, and execution upon their assets, is in addition to the existing, or common law, method. In other words, it is permissive and not mandatory.<sup>3</sup> It provides a convenient and expeditious means for bringing a partnership or association into court. Even those text writers who urge that a partnership is an entity for practically all purposes concede that statutes of this nature have no bearing on their contention, being remedial only.<sup>4</sup> But it may be generally stated that in the contemplation of law a

<sup>1</sup> (Dec. 4, 1919) 58 Cal. Dec. 508, 185 Pac. 850.

<sup>2</sup> Cal. Code Civ. Proc., § 388.

<sup>3</sup> *Whitman v. Keith* (1868) 18 Ohio St. 134.

<sup>4</sup> *Parsons, Partnership* (4th ed.), p. 4, note.

partnership is not a legal entity.<sup>5</sup> Exceptions are found to this rule in some jurisdictions,<sup>6</sup> and, for certain purposes, in all jurisdictions.<sup>7</sup> California may be numbered among those states in which the general rule prevails.<sup>8</sup> If this be true, it is submitted that a code section providing a special remedy does not create an entity where none was held to exist before. It would appear to be more accurate to say that for the purpose of obtaining jurisdiction a partnership or association may be treated as an entity, than to declare it to be an entity.

Inasmuch as the plaintiff may elect whether he shall avail himself of the privilege afforded by the statute or proceed as at common law,<sup>9</sup> it would follow that the existence or non-existence of a legal entity depends upon his sole choice; for, though the code provides that action may be brought against an association in its social name, it makes no such provision for the bringing of action by the association.<sup>10</sup> To find that the legislature, in passing a statute purely remedial on its face and not a part of the general law as to partnerships, intended to make all partnerships entities to the extent of preventing the several partners from setting up separate defenses, as they might do at common law, seems unreasonable.

R. H. L.

TORTS: LIABILITY OF LANDOWNERS TO CHILDREN: ATTRACTIVE NUISANCE DOCTRINE.—In 1873, the United States Supreme Court held that a railroad company was liable in an action by a child six years old, who had injured his foot while playing upon a turntable belonging to the company, notwithstanding the contention that the child was a trespasser to whom the company owed no duty.<sup>1</sup> The decision created a particular exception to the common law rule that the only duty owed by a landowner to trespassers is to refrain from intentionally or wantonly injuring them.<sup>2</sup> Since

<sup>5</sup> Burdick, Partnership (2nd ed.), p. 81, 20 R. C. L. 805.

<sup>6</sup> Burdick, Partnership (3rd ed.), p. 83.

<sup>7</sup> Supra, n. 5.

<sup>8</sup> People v. Maljan (1917) 34 Cal. App. 384, 167 Pac. 547; Schirran v. Dallas (1903) 21 Cal. App. 405, 132 Pac. 454.

<sup>9</sup> Supra, n. 3.

<sup>10</sup> Supra, n. 2.

<sup>1</sup> Railroad Co. v. Stout (1873) 17 Wall. 657, 21 L. Ed. 745.

<sup>2</sup> 2 Cooley on Torts (3rd ed.) 1258, 1268.

With respect to the common law rule that a landowner owes no duty to trespassers except to refrain from intentionally or wantonly injuring them, there is of course the well recognized exception, independent of the "attractive nuisance" cases, that liability attaches to the owner of grounds "*abutting a public highway or sidewalk, who suffers pit-falls or other nuisances dangerous to public travel, to remain so near to the margins of such highways or sidewalks, that persons in the lawful use of the same are liable to fall into such pit-falls, or stumble upon such obstructions through the ordinary accidents of travel.*" 1 Thompson, Commentaries on the Law of Negligence (2nd ed.) 871. See also Barnes v. Ward (1850) 9 C. B. 392, 137 Eng. Rep. R. 945. Thus the California Supreme Court held in Malloy v. Hibernia Savings & Loan Society (1889) 3 Cal. Unrep. Cas. 76, 21 Pac. 525, that a cause of action was stated in a complaint which alleged that plaintiff's son, three years old, was drowned by falling into an unguarded and unfenced cesspool, ten feet deep, maintained by defendant ten feet from a public traveled street on property not separated from the street by any fence or railing.